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June 3, 1996

RECEIVED
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Office of the Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: Implementation of the Local Competition Provisions in
the Telecommunications Act of 1996, Docket 96-98

Dear Sir:

Enclosed for filing on behalf of NEXTLINK Communications, L.L.C. are reply comments on access to rights of way. An original and 16 copies are included for distribution to the Commissioners.

We have delivered by hand today a copy of this letter and the reply comments in hard copy and on 3.5" WordPerfect 5.1 diskette to Janice Myles; three copies of the reply comments to Gloria Shambley; and a copy of the reply comments to the International Transcription Service. In addition, we have mailed a copy of the reply comments to all parties whose addresses are listed on the attached Commission service list.

Please date stamp and return to the messenger the copy of this cover letter.

Sincerely,

Daniel M. Waggoner / R&T

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DMW/tm

Enclosures

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Letter to Office of the Secretary
June 3, 1996
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JUN 3 1996

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

In the Matter of:) Docket No. 96-98
)
IMPLEMENTATION OF THE LOCAL)
COMPETITION PROVISIONS IN THE)
TELECOMMUNICATIONS ACT OF 1996)
_____)

REPLY COMMENTS OF
NEXTLINK COMMUNICATIONS, L.L.C.
ON ACCESS TO RIGHTS OF WAY

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Dated: June 3, 1996

NEXTLINK, a privately financed competitive local carrier, files these reply comments to emphasize the importance of access to rights-of-way and related facilities for the development of local competition. Although this issue received less attention in the opening comments than some other issues, NEXTLINK strongly believes that access to rights-of-way and facilities is the single largest immediate barrier to local facilities-based entry. Unless this Commission issues strong rules mandating access and procedures to enforce those rules, facilities-based local competition cannot even begin.

NEXTLINK therefore, files these reply comments to make the following specific points: (1) access to right-of-way and facilities is the most immediate barrier to facilities-based entry and requires action by this Commission; (2) the new right of access established by the Act should be enforced by this Commission in the first instance, not by the States; (3) utilities should not be allowed to "reserve" facilities for future use to limit access by other carriers; and (4) this Commission should establish clear procedures for carriers aggrieved by failures to provide access.

A. Access to Right-of-Way and Facilities Is Essential for the Development of Facilities-Based Local Competition.

As it described in its previous Comments, NEXTLINK is a new carrier that is seeking to develop facilities in various markets around the country to compete for local service with incumbent carriers. Although NEXTLINK has experienced many forms of delay

and resistance to competition, the single most important barrier to NEXTLINK's entry at this time is access to rights-of-way, poles, conduit and the like.

Nor has the problem of access been cured by passage of the Act. Indeed, NEXTLINK has approached a variety of municipalities and utilities in many areas around the country since the Act and has been repeatedly rebuffed. Pointing out the provisions of the Act, moreover, has not been a solution. Instead, a number of utilities have challenged NEXTLINK to find a viable avenue of redress. NEXTLINK has not had one.

As well as outright denials of access, NEXTLINK has experienced the imposition of extraordinarily burdensome and expensive conditions for access. These include revenue or facilities-sharing arrangements in which the incumbent utility seeks, in effect, to become NEXTLINK's partner. In addition, NEXTLINK has discovered that it, as the "new kid on the block" is routinely required to reimburse, indemnify, insure and otherwise make whole all existing carriers using facilities or rights-of-way. All of these demands, too, have been made since the Act. But NEXTLINK has no choice but to comply if it wishes to enter a particular market.

Only action by this Commission to establish substantive guidelines and procedural remedies will help ameliorate this problem. Otherwise, the promise of facilities-based entry will remain just that -- a promise that goes unfulfilled because of

the unwillingness of incumbent utilities to provide access on reasonable and nondiscriminatory rates, terms and conditions.

B. This Commission Should Promulgate Detailed Nationwide Rules to Effectuate the Right of Access Under the Act.

As the Act recognizes, nondiscriminatory access to poles, ducts, conduits and rights-of-way on reasonable rates, terms and conditions is critical to the eventual success of facilities-based entry into the local telecommunications marketplace. As proposed in the NPRM, therefore, the Commission should promulgate rules that further define the right of access granted under the Act. See NPRM ¶¶ 220-25. By contrast, the incumbent local carriers generally comment that the Commission should not promulgate such rules because pole attachment rates, terms and conditions predominantly are governed under State law as provided in Section 224. These commenting parties ignore both the plain language and intent of the Act.

Section 224, as amended by the Act, creates a right of access to poles, ducts, conduits, and rights-of-way owned or controlled by utilities and its scope has been broadened to apply to telecommunications companies, as well as to cable television companies. See 47 U.S.C. § 224(a) & (f) (1996). The Act, for the first time, creates a right of access to right-of-way and facilities for telecommunications carriers.

That section also provides in relevant part,

Nothing in this section shall be construed to
apply to, or to give the Commission
jurisdiction with respect to rates, terms,

and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by a State.

Id. § 224(c)(1) (emphasis added to amending language). By its express terms, section 224 may deprive the Commission of jurisdiction under that section over pole attachment rates, terms and conditions, or access to poles, ducts, conduits, and rights-of-way, but only when a State regulates these matters.

Some States do in fact regulate the rates, terms and conditions of pole attachments by cable television companies, as previously required by section 224. But far fewer States regulate the pole attachment rates, terms and conditions imposed on telecommunications companies. And, virtually no State mandates access to poles, ducts, conduits, and rights-of-way as required by the Act. The Commission, therefore, has jurisdiction over access, rates, terms and conditions of attachment to utility poles by telecommunications companies at least until States enact legislation to assume jurisdiction over these issues.

Even if a State assumes such jurisdiction, however, the Commission has an independent responsibility to ensure that local exchange companies fulfill their "duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224."

47 U.S.C. § 251(b)(4) (1996); see id. § 271(c)(2)(B)(iii)

(including in "competitive checklist" for Bell operating company

entry into interLATA markets that the BOC provide "nondiscriminatory access to poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224"). Section 224(c)(1) potentially limits Commission jurisdiction only as derived from that section. Section 251 (and 271) are an entirely separate section providing entirely different bases for Commission jurisdiction.

Congress established the general requirements for pole attachments by telecommunications and cable companies in section 224, but then provided the Commission with specific jurisdiction in section 251 to ensure that incumbent local exchange carriers do not use bottleneck pole, duct, conduit, and right-of-way facilities to thwart or undermine competition. The Commission, therefore, has -- and should assert -- jurisdiction over access, rates, terms and conditions of attachment to incumbent LECs' poles, ducts, conduits, and rights-of-way by (or available to) competitors, regardless of the existence or extent of State regulation.

C. The Incumbents' Claims of the Need to Establish "Reserve Requirements" Should Be Rejected.

A common theme running through the comments of many of the incumbent carriers and utilities is the claim that the Commission should not attempt to limit their ability to establish reserves for future use. See, e.g., Comments of Ohio Edison Company at 4; Comments of Bell Atlantic at 13. As NEXTLINK indicated in its

initial Comments, the Commission should give particular scrutiny to claims that right-of-way or facilities are needed for future use and not available to competitive carriers that wish to use the capacity currently. In fact, NEXTLINK suggests the Commission establish a presumption that such a claim is insufficient under the Act.

NEXTLINK is aware that utilities may need a capacity for future use. However, the primacy of competitive entry established by Congress in the Act outweighs such intangible and unknown claims of future necessity, which generally can be resolved through technical solutions later on. Furthermore, NEXTLINK's experience is that such claims often are masks for an anticompetitive purpose on the part of a carrier or utility that wishes to forestall competition by a new entrant such as NEXTLINK.

Finally, the Commission should explicitly note in its rules that the "insufficient capacity" basis for denial of access is only available to a utility directly providing electrical service. No such grounds for denial are included in the provisions applicable to telecommunications carriers controlling facilities or rights-of-way and none should be recognized by the Commission.

**D. The Commission Should Establish Procedures for
Expeditious Resolution of Disputes Concerning
Access to Rights-of-Way and Facilities.**

Today, NEXTLINK has a statutory right of access, but no remedy if access is refused. Given the importance of access to

NEXTLINK COMMUNICATION'S REPLY COMMENTS - 6

the development of local facilities-based competition, the Commission should adopt strong measures to provide such a remedy.

At a minimum, the Commission should establish an expeditious complaint procedure whereby carriers or utilities declining access bear a heavy burden of proof and must reply within a short period of time to any complaints. In order to expedite access, moreover, the Commission should establish short time frames in which incumbent carriers and utilities must respond initially to requests for access and provide access thereafter.

In the same vein, and to avoid unnecessary disputes, the Commission should rule broadly and in advance that access must be provided on the same terms and conditions that the incumbent applies to itself or its affiliates. In addition, the Commission should define and limit the reasons of safety, reliability and engineering to require them to be based only on generally accepted and published industry-wide criteria, not the criteria developed or applied by an individual utility.

With such rules and procedures, carriers such as NEXTLINK will be able to achieve the access that is critical to deployment of their alternative local networks. Any delay or lack of clarity in Commission action in this area will only serve to delay and burden competitive entry.

CONCLUSION

Congress recognized the incentives of the incumbent carriers and utilities to refuse reasonable access for competitors to rights-of-way and facilities. By adopting an explicit right of access for the first time, Congress has made clear the critical importance of access for facilities-based competition. The Commission should promulgate rules to fulfill Congress's goals.

Respectfully submitted,

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